(14)

No. 90-1390

Supreme Court, U.S.
FILED
SEP 5 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION, ET AL., PETITIONERS

v.

EVERT ROMEIN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

KENNETH W. STARR
Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DAVID S. FORTNEY
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

KERRY L. ADAMS
Counsel for Appellate Litigation

ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

We will address the following question:

Whether a 1987 Michigan law that required employers to pay additional workers' compensation benefits to certain employees for the period from 1982 to 1987 violates the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	6
Argument:	
I. The Court should review the 1987 Michigan law under the "arbitrary and irrational" standard	9
A. Economic legislation, including legislation with retroactive effect, is presumed to be constitutional, and the party alleging a violation of due process must show that the law is arbitrary and irrational	9
B. This Court's decisions show that a legislature rationally may apply economic legislation retroactively	12
C. The Court's established approach is justified by the wide variety of circumstances in which retroactive legislation is useful	14
D. The Court should not adopt the restrictive rules petitioners propose for reviewing due process challenges to retroactive legislation	19
II. The 1987 Michigan statute is neither arbitrary nor irrational	24
A. The 1987 Michigan law serves a legitimate legislative purpose	24
B. The 1987 Michigan law furthers legislative intent in a rational manner	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Adkins v. *Children's Hospital*, 261 U.S. 525 (1923)	13
Aduddell v. *Owens-Corning Fiberglass*, 16 Ben. Rev. Bd. Serv. (MB) 131 (1984)	16

Cases—Continued: Page

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 5
Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) 26
Calder v. *Bull*, 3 U.S. (1 Dall.) 386 (1798) 11
Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983) 24, 27
Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 7, 10, 13, 14, 19
Forbes Pioneer Boat Line v. *Board of Comm'rs*, 258 U.S. 338 (1922) 22
Franks v. *White Pine Copper Division*, 422 Mich. 636, 375 N.W.2d 715 (1985) 3
Funkhouser v. *J.B. Preston Co.*, 290 U.S. 163 (1933) 11, 20
Graham & Foster v. *Goodcell*, 282 U.S. 409 (1931) 22, 28
Kaiser Aluminum & Chem Corp. v. *Bonjorno*, 110 S. Ct. 1570 (1990) 20, 21
League v. *Texas*, 184 U.S. 156 (1902) 20
Lichter v. *United States*, 334 U.S. 742 (1948) 11, 21
Louviere v. *Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985) 16
McKesson Corp. v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990) 11, 21, 23
Moss v. *Hawaiian Dredging Co.*, 187 F.2d 442 (9th Cir. 1951) 26
National R.R. Passenger Corp. v. *Atchison, T. & S. F. Ry.*, 470 U.S. 1 (1976) 9, 10
Nacirema Operating Co. v. *Lynn*, 577 F.2d 852 (3d Cir. 1978), cert. denied, 439 U.S. 1069 (1979) 17-18
Norfolk, Baltimore & Carolina Lines v. *Director, Office of Workers' Compensation Programs*, 539 F.2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977) 18
Olsen v. *Nebraska*, 313 U.S. 236 (1941) 25
Pauley v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991) 15
Pension Benefit Guar. Corp. v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 4, 6, 9, 10, 13, 14, 19, 24
Pennsylvania Nat'l Mut. Casualty Ins. Co. v. *Spence*, 591 F.2d 985 (4th Cir.), cert. denied, 444 U.S. 963 (1979) 28

Cases—Continued: Page

Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 15
Puig v. *Standard Dredging Corp.*, 599 F.2d 467 (1st Cir. 1979) 17
Rowan Cos. v. *United States*, 452 U.S. 247 (1981) 26
State Ins. Fund v. *Pesce*, 548 F.2d 1112 (2d Cir. 1977) 18
Taddeo v. *Bethlehem Steel Corp.*, 22 Ben. Rev. Bd. Serv. (MB) 52 (1989) 17
Temple Univ. v. *United States*, 769 F.2d 126 (3d Cir. 1985), cert. denied, 476 U.S. 1182 (1986) 23, 26
Todd Shipyards Corp. v. *Witthuhn*, 596 F.2d 899 (9th Cir. 1979) 17
Travelers Ins. Co. v. *Marshall*, 634 F.2d 843 (5th Cir. 1981) 17
United States v. *Carolene Prods. Co.*, 304 U.S. 144 (1938) 10, 25
United States v. *Darusmont*, 449 U.S. 292 (1981) 23
United States v. *Heinszen & Co.*, 206 U.S. 370 (1907) 22
United States v. *Locke*, 471 U.S. 84 (1985) 10
United States v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989) 18
United States v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) 18
United States v. *Sperry Corp.*, 110 S. Ct. 387 (1989) 10, 13
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 2, 4, 6, 9, 10, 11, 12, 26
Van Emmerik v. *Janklow*, 454 U.S. 1131 (1982) 22
Washington Metro. Area Transit Authority v. Johnson, 467 U.S. 925 (1984) 15
Welch v. *Henry*, 305 U.S. 134 (1938) 11, 21
Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955) 10, 14, 27

Constitution and statutes:

U.S. Const.:
Art. I, § 10, Cl. 1 (Contract Clause) 1, 5, 24

Constitution and statutes—Continued: Page

Amend. V (Due Process Clause) 1, 2, 10, 18, 23, 24, 25
Amend. XIV (Due Process Clause) 1, 2, 6, 9, 10, 11, 21, 24, 25, 27
Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251:
§ 5(c), 86 Stat. 1253 17
§ 5(d), 86 Stat. 1254 17
Act of Sept. 28, 1984, Pub. L. No. 98-426, 98 Stat. 1639:
§ 2(b), 98 Stat. 1639 (33 U.S. 902(10)) 17
§ 4, 98 Stat. 1641 (33 U.S.C. 904(a), 905(a)) 15-16
§ 11(a), 98 Stat. 1648 (33 U.S.C. 912(a)) 17
§ 12(b)(2), 98 Stat. 1649 (33 U.S.C. 913(b)(2)) 17
Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* 1
30 U.S.C. 932(c) 15
30 U.S.C. 945 14
30 U.S.C. 945(a)(2)(A) 15
30 U.S.C. 945(b)(1) 15
30 U.S.C. 945(c) 15
Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119 § 205, 95 Stat. 1645 15
Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.* 7, 18
42 U.S.C. 9607 18
Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 502, 99 Stat. 438 13
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 1, 15
33 U.S.C. 902(10) (1982) 16
33 U.S.C. 902(10) 17
33 U.S.C. 904(a) 16
33 U.S.C. 905(a) 16
Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 ..... 6, 12

Statutes—Continued: Page

Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (29 U.S.C. 251-262) 26
29 U.S.C. 251(a) 26
29 U.S.C. 252(a) 26
29 U.S.C. 252(d) 26
Mich. Comp. Laws Ann. (1985 & Supp. 1991):
§ 418.351 2
§ 418.354(1) 2
§ 418.354(17)-(20) 3
§ 418.435 28
§ 418.611 27
§ 418.621(2)(a) 28
Mich. Stat. Ann. (Callaghan 1988 & Supp. 1991):
§ 17.237(351) 2

Miscellaneous:

Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J. 379 21
H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978) 15
H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. (1984) 16
Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960) 21
4 A. Larson, *Workmen's Compensation Law* (1990) 28
McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 Calif. L. Rev. 12 (1967) 19, 20, 21
Nelson, *Workers' Compensation: Coverage, Benefits, and Costs, 1988*, Soc. Sec. Bull. (March 1991) 27
2 *Selected Essays on Constitutional Law* (Ass'n of Am. L. Sch. ed. 1938) 21
S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 14
Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 216 (1960) 21, 26

Miscellaneous—Continued: Page

Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936) 21
Smith, *Retroactive Laws and Vested Rights*: 5 Tex. L. Rev. 231 (1927) 21

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1390

GENERAL MOTORS CORPORATION, ET AL., PETITIONERS

v.

EVERT ROMEIN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

In this case, the Michigan Supreme Court upheld a 1987 workers' compensation law that required employers to pay additional benefits for the period from 1982 to 1987 to employees injured prior to 1982. Petitioners urge reversal of that decision on the grounds that the retroactive effect of the law violates the Contract Clause, Art. I, § 10, Cl. 1, and the Due Process Clause of the Fourteenth Amendment.

While the Contract Clause does not apply to the federal government, retroactive laws enacted by Congress are subject to review under the Due Process Clause of the Fifth Amendment. Two laws administered by the Department of Labor, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, and the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, create federal workers' compensation programs, and both pro-

grams have been amended at various times to include provisions with retroactive effect. One such provision in the Black Lung Benefits Act was upheld by this Court against a due process challenge in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). The Court has made clear in *Turner Elkhorn* and elsewhere that the constraints imposed on retroactive legislation by the Due Process Clauses of the Fifth and the Fourteenth Amendments are the same. Therefore, the United States has a vital interest in the due process issue presented by this case.

STATEMENT

1. During 1980 and 1981, Michigan passed a series of laws to reform the State's workers' compensation program. Two of the laws are relevant here. One law, enacted in 1980, raised the maximum disability benefit. That law was entirely prospective, applying only to benefits for injuries that occurred after January 1, 1982. Mich. Comp. Laws Ann. § 418.351 (West 1985 & Supp. 1991); Mich. Stat. Ann. § 17.237(351) (Callaghan 1988 & Supp. 1991); Pet. App. 2a, 9a.

The other reform, enacted in 1981, provided for "coordination" of workers' compensation benefits and certain other employee benefits. The 1981 coordination provision permitted employers to reduce workers' compensation benefit payments by the employer-financed share of certain other benefits the employee received, such as benefits paid pursuant to pension plans. Mich. Comp. Laws Ann. § 418.354(1) (West 1985 & Supp. 1991). The coordination provision had an effective date of March 31, 1982, but it did not specify whether coordination applied to all benefit payments made after that date, or only to benefit payments for injuries that occurred after that date.

After the 1981 coordination provision took effect, petitioners began coordinating benefit payments to workers injured before March 1982 as well as to workers injured after that date. Pet. App. 60a. Thus, they interpreted the coordination of benefits law to apply retroactively as well as prospectively. Petitioners' interpretation was not universally shared. "The [Michigan] House and Senate both adopted legislative resolution[s] in early 1982, purporting to interpret [the coordination provision] to prevent the coordination of benefits of persons injured before the effective date." Pet. App. 3a n.2.

In 1985, the Michigan Supreme Court upheld petitioners' interpretation of the coordination provision in *Franks* v. *White Pine Copper Division*, 422 Mich. 636, 375 N.W.2d 715 (1985). The court held that the provision "clearly and unambiguously requires coordination of workers' compensation and other specified benefits for all compensable periods subsequent to its effective date, regardless of when the injury occurred." 422 Mich. at 651, 375 N.W.2d at 721. The court rejected arguments by the employees in that case that, so construed, the law was unconstitutionally retroactive. The court reasoned that workers' compensation payments do not compensate the recipient for a past injury but rather for the resulting loss of wage-earning capacity. 422 Mich. at 653-654, 375 N.W.2d at 722-723.

In May 1987, the Michigan legislature passed the law that gave rise to the present case. One provision of the 1987 law prohibited the future coordination of the workers' compensation benefits of workers injured before March 1982. Another provision of the 1987 law—the provision at issue here—required employers to pay (with interest) benefits withheld from employees injured before March 1982 as a result of the application of the coordination of benefits law. Mich. Comp. Laws Ann. § 418.354(17)-(20) (West 1985 & Supp. 1991). Thus, the practical effect of the 1987 law was to negate the retroactive effect of the 1981 law. That is, under the 1987 law employees injured prior to 1982 were not to be subject after 1987 to the coordination of benefits law, just as they were not subject to the 1980 law increasing workers' compensation benefit levels. In addition, employees injured before 1982 were to be reimbursed for losses they suffered between 1982 and 1987 on account of the retroactive application of the coordination of benefits law to them.

2. Respondents Evert Romein and Arturo Gonzalez are former employees of petitioners General Motors Corporation and Ford Motor Company, respectively. Both Romein and Gonzalez were injured and began receiving uncoordinated workers' compensation benefits before 1982. Each suffered a reduction in those benefits after 1982 when their benefits were coordinated by petitioners. Pet. App. 2a, 63a.

Both Romein and Gonzalez successfully contested the coordination of their benefits in administrative hearings conducted by the Michigan Bureau of Workers' Compensation. Those hearings occurred before the Michigan Supreme Court held in *Franks* that the 1981 coordination of benefits law applied to employees injured before 1982. The ruling in favor of Romein was then reversed, in light of *Franks*, by the Michigan Workers' Compensation Appeal Board. Gonzalez's appeal was not decided until after the 1987 law had taken effect, and the Board upheld the ruling in favor of Gonzalez under that law. The Michigan Court of Appeals subsequently consolidated the cases and ruled in favor of the employees. Pet. App. 58a-69a.

3. The Michigan Supreme Court, sitting en banc, affirmed the court of appeals' decision. It held that the 1987 Michigan law "may validly be applied to all compensation liabilities within its terms except those which have been reduced to final judgment before its enactment." Pet. App. 1a.

In rejecting the employers' Due Process Clause challenge, the court relied on *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984). The court determined, first, that the 1987 law satisfied the "rational relationship" analysis set forth in those two decisions. It explained: "The retroactive portions of the statute * * * are justified by a rational legislative purpose to protect the benefit levels of workers who did not receive the increases in the legislative reform packages of 1980 and 1981. Since they did not receive the increase, remedial measures were needed." Pet. App. 9a. The court then determined that GM and Ford could not reasonably have relied on the prior state of the law, since the law was "in a state of flux" from 1982 to 1987. *Id.* at 12a. Finally, the court found, GM and Ford did not have a "vested" or "contractual" right to the level of payments they had made. In this connection, the court emphasized that the 1987 law "does not create a new entitlement conferring a disability status not provided under prior law." *Id.* at 13a.

The court adopted alternative holdings in rejecting the employers' Contract Clause claim. It initially held that the employers' reliance on a previous level of workers' compensation benefits is not "a legitimate contractual expectation protected by the Contract Clause." Pet. App. 14a. In the alternative, the court held that the 1987 law did not unconstitutionally impair contract obligations under the three-part analysis set forth in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978). First, the degree of impairment of petitioners' rights was not substantial, the court concluded, since the employers retained the "basic benefit" of limited tort liability for work-place injuries. Pet. App. 15a. Second, the court found the state interest underlying the 1987 law—to "protect[] the right of disabled employees to receive the full compensation intended by the Legislature in return for the relinquishment of their tort claim"—to be "significant." *Id.* at 16a. Third, the court stated that the degree of retroactivity was "reasonable" since "the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." *Id.* at 17a.[1]

---

[1] In their challenge based on the Michigan Constitution, the employers argued that the 1987 statute impermissibly encroached on matters confided to the judiciary. The court rejected that argument, finding it sufficient that the law did not "impair final judgments." Pet. App. 18a.

SUMMARY OF ARGUMENT

I. The proper approach to judicial review of economic legislation challenged on due process grounds is well established. Such legislation "come[s] to the Court with a presumption of constitutionality" and "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). It is equally well settled that the same deferential standard of review applies to economic legislation that has retroactive effect. *Id.* at 729; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The Due Process Clauses give legislatures broad discretion in adjusting economic rights and duties, and the "vague contours" of due process do not prescribe limits on a legislature's authority to make retroactive adjustments any more than they dictate other line-drawing decisions that enter into the drafting of economic legislation. See *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963).

This Court has accordingly upheld retroactive economic legislation, including legislation providing for workers' compensation, that rationally furthers legitimate legislative objectives. In *Turner Elkhorn*, for example, the Court rejected a due process challenge to a provision of the Black Lung Benefits Act that required coal mine operators to pay compensation to former employees who had left the industry before the effective date of the Act. Similarly, in *Gray*, the Court upheld a provision of the Multiemployer Pension Plan Amendments Act of 1980 that imposed withdrawal liability on employers who withdrew from multiemployer plans before the amendments became law. In each case, the Court found that retroactive legislation was a rational method of responding to a serious social problem.

The wisdom of this Court's established approach is confirmed by consideration of the wide variety of problems that Congress has concluded can best be solved through

legislation with retroactive features. Of particular relevance here, Congress has amended two federal workers' compensation statutes on various occasions to include provisions having retroactive effect. In each instance, Congress reasonably determined that retroactive legislation was necessary to respond to problems such as those presented by workers who contract occupational diseases having long latency periods. Workers' compensation is not the only social problem that has been rationally approached through retroactive federal legislation, however, as Congress's retroactive application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) illustrates. As was the case with latent occupational diseases, Congress determined that the problems presented by the build-up of hazardous wastes were best remedied by legislation having retroactive effect.

This Court should not abandon the flexible approach it has applied in favor of the rigid rules petitioners propose. In summary, petitioners contend that "purely" retroactive legislation should be considered "presumptively unconstitutional," and should be upheld under the Due Process Clause only if it is "curative" or does not "reach back beyond the session of [the legislature's] immediate predecessor." Pet. Br. 38, 39, 43. The fundamental flaw in petitioners' proposal is that it contravenes the proper role of reviewing courts by restricting legislative discretion in matters that the Constitution assigns to legislatures. In any event, petitioners' rules are premised in part on ill-defined distinctions between laws that are "purely" retroactive and laws that are not, and between laws that are "curative" and laws that are not. In addition, petitioners' proposal to restrict the retroactive effect of legislation to one prior legislative term is simply borrowed from Congress's practice in the tax area, even though legislatures may need more flexibility in dealing with other problems.

II. The 1987 Michigan law furthers a legitimate legislative purpose in a rational manner and should therefore be upheld. The effect of the 1987 law was simply to undo the effect of the retroactive application of the 1981 coordination of benefits law to persons injured before 1982. As the Michigan Supreme Court stated, it made particular sense to negate the retroactive application of the coordination of benefits law because employees injured before 1982 did not benefit from the 1980 law that increased workers' compensation benefits.

Petitioners suggest that it would have made more sense for the Michigan legislature to apply the law increasing benefit levels retroactively to all persons injured before 1982. But the legislature certainly did not act irrationally by deciding to treat employees injured before 1982 according to the rules in effect at the time they were injured, and to treat employees injured after 1982 in accord with the rules in effect at that time. In addition, petitioners' argument that the 1987 law should be overturned because they made economic decisions based on their understanding that the 1981 law applied retroactively is not meritorious. As an initial matter, since petitioners had made insurance decisions prior to 1982 under the assumption that coordination of benefits was not allowed, they obtained a windfall when the coordination of benefits law was initially given retroactive effect. In addition, employees who were injured prior to 1982 similarly made decisions based on their expectations that they would receive uncoordinated benefits, and their reliance interests are at least as deserving as petitioners' reliance interests.

ARGUMENT

I. THE COURT SHOULD REVIEW THE 1987 MICHIGAN LAW UNDER THE "ARBITRARY AND IRRATIONAL" STANDARD

This Court has consistently applied the "arbitrary and irrational standard" in assessing challenges to retroactive legislation based on the Due Process Clauses. There is no good reason to accept petitioners' invitation to apply a stricter standard.

A. Economic Legislation, Including Legislation With Retroactive Effect, Is Presumed To Be Constitutional, And The Party Alleging A Violation Of Due Process Must Show That The Law Is Arbitrary And Irrational

This Court's decisions do not support petitioners' contention (Pet. Br. 38) that retroactive legislation is in some cases presumptively unconstitutional. To the contrary, the Court's decisions make clear that retroactive economic legislation is not subject to "heightened judicial scrutiny" under the Due Process Clauses. *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 731 (1984). Due process requires only that economic legislation, including legislation with retroactive effect, advance a legitimate legislative purpose in a rational way.

"It is now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Gray*, 467 U.S. at 729; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Accord *National R.R. Passenger Corp.* v. *Atchison, T. & S. F. Ry.*, 470 U.S. 451, 463 (1985) (a "firmly established presumption of constitutionality * * * attaches to legislative Acts 'adjusting the burdens and

benefits of economic life' ").[2] Such legislation is constitutional if it furthers a legitimate legislative purpose in a rational way. See, *e.g.*, *United States* v. *Locke*, 471 U.S. 84, 104 (1985); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955); see also *National R.R. Passenger Corp.*, 470 U.S. at 477.

"[T]he strong deference accorded legislation in the field of National economic policy is no less applicable when that legislation is applied retroactively." *Gray*, 467 U.S. at 729. Of course, "[i]t does not follow * * * that what Congress can legislate prospectively it can legislate retrospectively." *Turner Elkhorn*, 428 U.S. at 16. "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process." *Id.* at 17. "But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989). "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Gray*, 467 U.S. at 729.

The Court's approach to the review of retroactive economic legislation has deep roots. As the Court observed in *Turner Elkhorn*, the cases "are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." 428 U.S. at 16

[2] State laws challenged under the Due Process Clause of the Fourteenth Amendment and federal laws challenged under the Due Process Clause of the Fifth Amendment are governed by the same analysis. See, *e.g.*, *Turner Elkhorn*, 428 U.S. at 19, citing *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963) and *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); see also *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 148 (1938).

(citations omitted). The Court's statement applies to review of both federal and state laws with retroactive effect. *Ibid.*, citing, *inter alia*, *Lichter* v. *United States*, 334 U.S. 742, 788-789 (1948) (upholding application of the federal Renegotiation Act, which authorized the recovery of excessive profits by government contractors, to contracts executed before its enactment), and *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163, 167-169 (1933) (upholding a state law retroactively authorizing the recovery of interest in contract actions for unliquidated damages). For at least the last 50 years, it has been settled that "[t]he mere fact that * * * legislation is retroactive does not bring it into conflict with the guarantees of the Federal Constitution." *Funkhouser*, 290 U.S. at 167-168.[3]

While the Court has consistently refused to adopt a *per se* rule invalidating economic legislation with retroactive effect, it has also made clear that due process imposes certain limits. The Court has warned that economic legislation, whether prospective or retrospective, may be "so harsh and oppressive as to transgress the constitutional limitation" of due process. *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2252 n.23 (1990), quoting *Welch* v. *Henry*, 305 U.S. 134, 147 (1938). Moreover, the Court has "take[n] into account" reliance on prior law in determining whether retroactive legislation is "so harsh and oppressive" that it runs afoul of due process strictures. *Turner Elkhorn*, 428 U.S. at 17. This Court's decisions thus

[3] Indeed, one of this Court's earliest decisions upheld a retroactive state statute. In *Calder* v. *Bull*, 3 U.S. (1 Dall.) 386 (1798), the Court rejected a challenge under the *ex post facto* clause to a Connecticut law that retroactively granted a new trial in a probate case. While *Calder* was decided before the Fourteenth Amendment was added to the Constitution, the decision illustrates the Court's longstanding attitude toward retroactive legislation. Justice Chase stated that, while laws should ordinarily operate prospectively, "there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement." *Id.* at 391.

make clear that, while due process grants legislatures broad discretion in matters of social and economic policy, it also requires courts to safeguard individual interests against arbitrary legislative action.

B. This Court's Decisions Show That A Legislature Rationally May Apply Economic Legislation Retroactively

In its most recent decisions regarding the constitutionality of retroactive legislation, this Court has addressed statutes adjusting the benefits and burdens of economic life. The Court's opinions demonstrate that a legislature may rationally implement its judgments as to how those benefits and burdens should be distributed through retroactive legislation. Those decisions also show that a legislative judgment to give retroactive effect to a law, like other judgments that enter into the drafting of economic legislation, reflects policy decisions that the Constitution largely confides to legislatures, not the courts.

At issue in *Turner Elkhorn* was a retroactive provision that embodied Congress's judgment about how to allocate the costs incurred by coal miners disabled by black lung disease. 428 U.S. at 6-8. The provision required coal mine operators to compensate former employees who had left the industry before the effective date of the Act, and the Court upheld Congress's decision to allocate the costs of black lung disease "by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business." *Id.* at 18. The Court concluded that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the [mine] operators and the coal consumers." *Ibid.*

In *Gray*, the Court upheld provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) that required employers who withdrew from multiemployer pension plans within five months prior to the enactment of the 1980 amendments to pay their share of unfunded vested benefits. See 467 U.S. at 723-725. Under prior law, withdrawing employers did not have to make such payments. *Id.* at 721. The Court held that retroactive application of the withdrawal provisions was rational because, otherwise, some employers would have had a strong economic incentive to withdraw from multiemployer plans while the legislation was pending, leaving the plans with unfunded liabilities. *Id.* at 730-731. Since making plans financially stable was one of Congress's primary purposes, the Court determined that "it was eminently sensible for Congress to conclude that the purposes of the MPPAA could be more fully effectuated if its withdrawal liability provisions were applied retroactively." *Id.* at 730.

In *Sperry*, the Court upheld the retroactive application of Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 438, which charged a fee to successful claimants before the Iran-United States Claims Tribunal. 110 S. Ct. at 396-397. Retroactive application, the Court observed, "ensure[d] that all successful claimants before the Tribunal are treated alike in that all have to contribute toward the costs of the Tribunal." *Id.* at 396. The Court found that "[i]t [was] surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *Ibid.*

The decisions in *Turner Elkhorn*, *Gray*, and *Sperry* reflect long established principles governing due process review of economic legislation and show that those principles fully apply to legislation with retroactive effect. They illustrate that the "vague contours" of due process require reviewing courts to accord broad discretion to legislative judgments about the wisdom and utility of economic legislation. *Ferguson* v. *Skrupa*, 372 U.S. at 731, quoting *Adkins* v. *Children's Hospital*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting). In the absence of

fixed constitutional standards, there is a danger that "courts [may] substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." 372 U.S. at 730. Because they are accountable to the public, legislatures are better suited than courts "to balance the advantages and disadvantages" of economic legislation. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487 (1955). And as *Turner Elkhorn*, *Gray*, and *Sperry* demonstrate, a legislature may rationally strike the balance among competing economic interests in favor of retroactive application.

C. The Court's Established Approach Is Justified By The Wide Variety Of Circumstances In Which Retroactive Legislation Is Useful

In *Gray*, the Court rejected efforts by the lower court (467 U.S. at 727 n.6) and by the parties (*id.* at 731-734) to devise a special formula for judicial review of retroactive legislation. The Court has properly avoided adopting rigid rules in this context and has adhered to the due process analysis applicable to all economic legislation. Review of some of the circumstances in which Congress has decided to legislate retroactively illustrates why such legislation should not be regarded as presumptively unconstitutional, but should instead be reviewed under the "arbitrary and irrational" standard.

In addition to the retroactive aspect of the Black Lung Benefits Act that was upheld in *Turner Elkhorn*, Congress also amended the Act in 1978 and provided that its amendment would have retroactive effect. Congress acted retroactively because it had determined that the eligibility standards in the existing program were too strict and that many deserving claims by "old and sick miners and their widows" had been unjustly denied. S. Rep. No. 209, 95th Cong., 1st Sess. 1 (1977). To remedy that problem, Congress enacted more liberal eligibility standards that applied not only to future claims but also to claims pending or denied under prior law. 30 U.S.C. 945.

In accordance with the 1978 amendments, thousands of previously unsuccessful claimants had their cases reopened and administratively readjudicated under the new criteria. See generally *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2529-2530 (1991); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 111 (1988). Claimants who succeeded on the second try were awarded benefits "on a retroactive basis" covering periods extending more than four years before enactment of the 1978 Amendments. 30 U.S.C. 945(c). The cost of those awards was borne by coal mine operators or the operator-funded Black Lung Disability Trust Fund. 30 U.S.C. 945(a)(2)(A), 945(b)(1); H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 21-22 (1978).[4] The coal mine operators did not mount a due process challenge to the 1978 Amendments, but if they had the courts properly would have concluded, in our view, that Congress was justified in ordering the reopening of claims that were denied under standards that were more stringent than it desired.[5]

Congress has also amended the workers' compensation program established by the Longshore and Harbor Workers' Compensation Act (LHWCA) in ways that have had retroactive impact. Two examples are found in 1984 amendments to the LHWCA. One amendment responded to *Washington Metro. Area Transit Authority* v. *Johnson*, 467 U.S. 925 (1984), which established that a general contractor was immune from tort suits brought by a subcontractor's employees unless the general contractor had neglected to secure compensation coverage for those employees after the subcontractor failed to do so. Congress amended the LHWCA to change that result, and provided that the amendment applied to cases pending on the date of enactment. Pub. L. No. 98-426, § 4, 98 Stat.

---

[4] In 1981, Congress transferred liability for all reopened claims to the Trust Fund. Pub. L. No. 97-119, § 205, 95 Stat. 1645, codified at 30 U.S.C. 932(c).

[5] In reviewing regulations implementing the 1978 amendments, this Court did not suggest that its retroactive features rendered it unconstitutional. See *Pittston Coal Group*, 488 U.S. at 122.

1641, codified at 33 U.S.C. 904(a), 905(a). The conference report explained that the holding in *WMATA* did not comport with "what had widely been regarded as the proper rules governing contractor and subcontractor liability and immunity under the [LHWCA]." H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 24 (1984). The report added that the amendment was intended to "avoid the dismissal, under *WMATA*, of third-party suits which were pending or on appeal on the date of enactment." *Ibid.* This provision was upheld against a due process challenge on retroactivity grounds in the only case in which it was challenged.[6]

Another 1984 amendment to the LHWCA authorized the award of disability and death benefits for occupational diseases that, because of long latency periods, first appear after retirement. Prior law had defined "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or another employment." 33 U.S.C. 902(10) (1982). In *Aduddell* v. *Owens-Corning Fiberglass*, 16 Ben. Rev. Bd. Serv. (MB) 131 (1984), the Department of Labor's Benefits Review Board had relied on that definition to deny benefits to a claimant who voluntarily retired before manifesting work-related asbestosis. The Board reasoned that, because the claimant had retired voluntarily, he could not prove that asbestosis caused any loss of wage-earning capacity. *Aduddell*, 16 Ben. Rev. Bd. Serv. (MB) at 133. Seven months after *Aduddell* was decided by the Board, Congress redefined

[6] In that case, *Louviere* v. *Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985), the court of appeals, applying the 1984 amendment, held that a general contractor was subject to suit by the employee of a subcontractor, where the subcontractor had secured workers' compensation coverage under the Act. In reversing the district court, the court of appeals acknowledged that the district court, which had applied *WMATA*, had reached the correct result under the holding in that case. *Id.* at 429. The court of appeals held that the general contractor's due process challenge to the retroactive application of the 1984 amendment was "without merit." *Id.* at 430.

"disability" to remove the requirement that a retired claimant prove that an occupational disease caused a loss of wage-earning capacity. Pub. L. No. 98-426, § 2(b), 98 Stat. 1639, amending LHWCA § 2(10), 33 U.S.C. 902(10). Since Congress also provided that the limitations period should run from the date on which the employee or claimant became aware of the relationship between the employment, the disease, and the death or disability, §§ 11(a) and 12(b)(2), 98 Stat. 1648-1649, codified at 33 U.S.C. 912(a) and 913(b)(2), employers could be required to pay compensation for pre-enactment periods based on a disability that would not have been compensable under prior law.[7] But it was not arbitrary and irrational for Congress to have determined that employers should be required to provide benefits to former employees (or their survivors) who suffered from asbestosis in their old age on account of exposure to asbestos while they were working.[8]

[7] The potentially significant retroactive impact of the 1984 amendments is illustrated in *Taddeo* v. *Bethlehem Steel Corp.*, 22 Ben. Rev. Bd. Serv. (MB) 52 (1989). The husband of the claimant in that case voluntarily retired in 1963 and died of lung cancer in 1965. His widow filed a claim for death benefits soon after a doctor told her in March 1982 that her husband's death was linked to exposure to asbestos at work. The Board held that she was entitled to a retroactive award of benefits calculated from the date of her husband's death.

[8] Like the 1984 amendments to the LHWCA, the 1972 amendments to that statute included provisions with retroactive effect. One such provision changed prior law by enabling survivors of permanently disabled workers to receive death benefits even when the worker's death was not caused by the employment-related injury. Pub. L. No. 92-576, §§ 5(c) and (d), 86 Stat. 1253-1254. In numerous cases, employers and insurance carriers challenged the provision as impermissibly retroactive insofar as it applied to workers injured prior to enactment. Those challenges were rejected in all six circuits that considered the issue. *Travelers Ins. Co.* v. *Marshall*, 634 F.2d 843, 845-848 (5th Cir. 1981); *Puig* v. *Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979); *Todd Shipyards Corp.* v. *Witthuhn*, 596 F.2d 899, 902-903 (9th Cir. 1979); *Nacirema Operating Co.* v. *Lynn*,

Problems involving disabled workers are not the only problems that Congress has concluded can best be addressed by legislation with retroactive effect. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, imposed liability on persons who disposed of hazardous wastes prior to its enactment. Indeed, CERCLA's liability provisions may be applied in a manner that is entirely retroactive: persons may be held liable for the disposal of hazardous wastes prior to CERCLA's enactment, and the amount of their liability may reflect the costs of pre-enactment cleanup efforts. 42 U.S.C. 9607. The retroactive provisions of CERCLA have been upheld against Due Process Clause challenges by the two courts of appeals that have addressed the issue. Each court correctly held that Congress reasonably decided that the massive problem posed by hazardous wastes could be remedied only by retroactive legislation. *United States* v. *Monsanto Co.*, 858 F.2d 160, 174 (4th Cir. 1988) ("CERCLA operates remedially to spread the costs of responding to improper waste disposal among all parties that played a role in creating the hazardous conditions"), cert. denied, 490 U.S. 1106 (1989); *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732-737 (8th Cir. 1986) ("[i]n order to be effective, CERCLA must reach past conduct"), cert. denied, 484 U.S. 848 (1987).

In sum, Congress repeatedly confronts problems that can best be solved by legislation that has retroactive effect. The variety of such problems, and Congress's need for flexibility in addressing them, confirm the wisdom of this Court's present approach to review. That approach affords legislatures needed flexibility to decide matters of

---

577 F.2d 852, 853-854 (3d Cir. 1978), cert. denied, 439 U.S. 1069 (1979); *State Ins. Fund* v. *Pesce*, 548 F.2d 1112, 1114-1115 (2d Cir. 1977); and *Norfolk, Baltimore & Carolina Lines* v. *Director, Office of Workers' Compensation Programs*, 539 F.2d 378, 380 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977).

social and economic policy while protecting individual economic interests from unjustifiably oppressive legislation.

D. The Court Should Not Adopt The Restrictive Rules Petitioners Propose For Reviewing Due Process Challenges To Retroactive Legislation

In the face of this settled body of authority, petitioners urge the Court to shift gears dramatically. Specifically, petitioners recommend that "purely" retroactive laws should be "presumptively unconstitutional," Pet. Br. 38, and that this Court should uphold such laws only if they are "curative," Pet. Br. 39, or do not "reach back beyond the session of [the legislature's] immediate predecessor," Pet. Br. 41. Here, as in *Gray* (467 U.S. at 727 n.6), the Court should decline an invitation to reduce judicial review of retroactive economic legislation to a rigid formula. The rules that petitioners propose cannot be reconciled with the limited review of economic legislation that is proper under the "vague contours" of due process, *Ferguson* v. *Skrupa*, 372 U.S. at 731; what is more, as a practical matter petitioners' approach is unworkable.

Petitioners base their proposed new rules on a distinction that one commentator has drawn between laws that are purely retroactive and laws that are partially retroactive. Pet. Br. 33-35, quoting McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 Calif. L. Rev. 12, 58-59 (1967). Under petitioners' scheme, as we understand it, the 1981 Michigan law that imposed coordination of benefit rules to injuries incurred before the law took effect (and reduced petitioners' liabilities to those injured workers) is an example of a partially retroactive statute because it affected benefit payments that were to be made for periods after the law was enacted. The 1987 law that undid the retroactive effect of the 1981 law (and imposed liabilities on petitioners for the period from 1982 to 1987), however, is purely retroactive because it related to past benefit periods.

At the outset, petitioners' approach poses serious classification problems. Many retroactive statutes cannot be definitely identified as either "purely" or "partially" retroactive. For example, a statute authorizing an award of interest in contract actions for unliquidated damages commenced after enactment could be considered either "purely" or "partially" retroactive. It is "purely" retroactive in the sense that it both alters the legal consequences of a breach of contract and fixes the amount of liability by reference to a past period. In those two respects, such a statute resembles the 1987 Michigan statute at issue here, which petitioners label "purely" retroactive. Nonetheless, our illustrative statute also satisfies petitioners' definition of "partially" retroactive statutes, since the statute would require unsuccessful defendants to make a payment of interest *after* the law is enacted and *after* an adverse judgment was entered. In those respects, the law "affect[s] the[] future legal consequences [of past acts] as of the time the new law is adopted." Pet. Br. 34 (quoting McNulty, 55 Calif. L. Rev. at 59). Thus, the answer to the threshold inquiry that petitioners propose "depends upon what one considers to be the determinative event." *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 110 S. Ct. 1570, 1588 n.3 (1990) (Scalia, J., concurring) (discussing the difficulty of determining whether a statute is prospective or retrospective).

This Court's decisions do not support petitioners' contention that due process draws a line between "partially" and "purely" retroactive laws. In *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163 (1933), the Court upheld against a due process attack a New York statute identical to the illustrative statute described above. As explained, that statute arguably qualifies as purely retroactive under petitioners' approach. See also *League* v. *Texas*, 184 U.S. 156, 160-162 (1902) (upholding against due process challenge a state law providing for the retroactive assessment of interest on delinquent taxes). In other cases, the Court has upheld statutes that, though

more difficult to classify, arguably were purely retroactive. For example, the Renegotiation Act upheld in *Lichter*, 334 U.S. at 788-789, which authorized the recovery of excessive profits earned by government contractors under contracts executed prior to its enactment, was purely retroactive in the sense that it reduced profits earned under contracts negotiated before the Act took effect. Such decisions cast grave doubt on petitioners' assertion (Pet. Br. 41) that the Court has never upheld a purely retroactive law that was not either "curative" or in compliance with the temporal limitation that petitioners propose.[9]

Petitioners' approach suffers from a more fundamental flaw because their distinction between purely and partially retroactive laws does not help decide whether a law is "so harsh and oppressive as to transgress the constitutional limitation" imposed by the Due Process Clauses. *McKesson*, 110 S. Ct. at 2252 n.23, quoting *Welch* v. *Henry*, 305 U.S. 134, 147 (1938). In this case, for example, the Michigan legislature could have passed a partially retroactive law that had a more severe impact on employers than the law it actually passed. For ex-

---

[9] Petitioners' classification scheme aside, it will often be "difficult * * * to decide whether a particular application *is* retroactive." *Kaiser*, 110 S. Ct. at 1587-1588 (Scalia, J., concurring). Commentators have been unable to agree on what makes a law impermissibly retroactive. See, *e.g.*, Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J. 379, 428-447; McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 Calif. L. Rev. 12, 57-59 (1967); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 216, 217-220 (1960); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 781-782 (1936); Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231 (1927), *reprinted in* 2 *Selected Essays on Constitutional Law* 266, 267-268 (Ass'n of Am. L. Sch. ed. 1938). Petitioners' proposed distinction between "pure" and "partial" retroactivity only exacerbates the difficulty.

ample, the legislature might have raised future compensation rates for employees whose benefits had been coordinated in the past, or it could have required that each such employee be paid a uniform lump sum. Depending on the size of the rate increase or the lump sum, those alternatives could have had a greater financial impact on employers than the law actually enacted. Yet such laws would not be purely retroactive, and hence presumptively unconstitutional, under petitioners' scheme. This shows that petitioners' approach does not reliably identify especially harsh laws, but merely diverts the proper focus of due process analysis.

Petitioners' proposed exception allowing purely retroactive legislation that would "retroactively cure a defect in a statute by conforming [it] to past administrative practice," Pet. Br. 39, suffers from defects similar to their distinction between "purely" and "partially" retroactive laws. This Court's decisions show that "curative" legislation is difficult to identify. See *Van Emmerik* v. *Janklow*, 454 U.S. 1131, 1132 (1982), (White, J., dissenting from dismissal of appeal); compare *Forbes Pioneer Boat Line* v. *Board of Comm'rs*, 258 U.S. 338 (1922), with *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907); see also *Graham & Foster* v. *Goodcell*, 282 U.S. 409 (1931). Moreover, a special rule for "curative" legislation would shift the focus of due process analysis away from whether a law is rational when all of its effects are considered to whether "reliance interests are * * * threatened." Pet Br. 40. And more significantly, petitioners' distinction between curative legislation and other sorts of retroactive legislation prohibits legislatures from responding to social problems if the response reflects a change in policy rather than the correction of technical error. See Pet. Br. 38. Such a rule ignores the latitude granted elected bodies under the Constitution to reassess prior policy in light of new information.

Similar difficulties attend petitioners' proposal to place an absolute temporal limitation on retroactive legislation.

Petitioners' proposal—to limit "the authority of a legislature to reach back beyond the session of its immediate predecessor," Pet. Br. 41—makes minimal disruption of settled expectations the centerpiece of due process review. But many problems require legislation with retroactive effects of longer duration than petitioners would permit. Problems like black lung disease and hazardous waste may exist for a long time and impose massive social costs before they are recognized. Once such problems are recognized, and the legislation to address them enacted, the further passage of time often yields new information that exposes inadequacies in prior law. The Due Process Clauses do not impose a time limit on legislatures' authority to respond in such circumstances, but require only that the response be rational.

Nor do decisions of this Court impose any such temporal requirement. Petitioners derive their proposed time limit from decisions of this Court referring to Congress's practice in the tax field, where " 'retroactive' application apparently has been confined to short and limited periods." *United States* v. *Darusmont*, 449 U.S. 292, 296-297 (1981) (per curiam); see Pet. Br. 41. None of those decisions, however, suggests that due process compels this practice. Rather, the Court has stated that "beyond some temporal point" retroactive laws may offend due process, but it has never attempted to define that point. *McKesson*, 110 S. Ct. at 2252 n.23.[10] Furthermore, the specialized nature of tax law counsels against relying on Congress's self-imposed custom in that field to fashion a constitutional requirement. Moreover, the primary purpose of tax laws is to fund current government operations, a purpose that can usually be achieved

[10] Likewise, "no federal court of appeals has yet adopted an absolute temporal limitation on retroactivity," even in reviewing tax legislation. *Temple Univ.* v. *United States*, 769 F.2d 126, 135 (3d Cir. 1985) (upholding the constitutionality of a 1984 law governing plaintiff's FICA tax liability for 1979 through 1982), cert. denied, 476 U.S. 1182 (1986).

through prospective legislation. In other areas, Congress rationally has decided that legislation with retroactive effect, and sometimes retroactive effect going back more than one legislative term, is necessary.[11]

II. THE 1987 MICHIGAN STATUTE IS NEITHER ARBITRARY NOR IRRATIONAL

In addition to proposing their new test for evaluating the constitutionality of retroactive legislation under the Due Process Clause, petitioners contend that the 1987 Michigan law is unconstitutional under the established standard. Pet. Br. 48-50. We disagree. The law furthers a legitimate legislative purpose in a rational way and therefore does not violate due process principles.

A. The 1987 Michigan Law Serves A Legitimate Legislative Purpose

The Michigan Supreme Court determined that the 1987 law served "a legitimate state interest." Pet. App. 17a. The court explained:

> It is significant that in the 1981 amendment, the resources saved as a result of coordination of benefits were reallocated to increase benefit levels generally. These increased levels, however, were only for injuries after January 1, 1982. The Legislature could have reasonably found that the coordination of benefits caused hardship among the employees whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982. There was a legitimate state interest, therefore, in correcting this perceived inequity.

Ibid.

Petitioners object that the court "hypothesized" this rationale for the 1987 law. Pet. Br. 49. As an initial matter, under the Due Process Clauses "the existence of facts supporting the [Michigan law] is to be presumed," and the burden is on petitioners to adduce evidence that "preclude[s] the assumption that [the law] rests upon some rational basis within the knowledge and experience of the legislators." *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); see also *Olsen* v. *Nebraska*, 313 U.S. 236, 246-247 (1941). In any event, it is evident that the Michigan legislature passed the 1987 law to eliminate the retroactive effect of the 1981 law, and the 1987 law plainly had the effect that the Michigan Supreme Court described. That is, all that the Michigan legislature did in 1987 was to remove the effects of the application of the 1981 law to injuries occurring before it took effect. Such a purpose—to retroactively eliminate the effects of the retroactive application of a prior law—is plainly rational; it certainly seems odd for petitioners to contend that negating the retroactive effect of a law is an irrational goal. In addition, as the Michigan Supreme Court emphasized, the fact that employees injured before 1982 did not share in the general increase in benefits provides an additional reason not to subject them to the coordination of benefits law.

Furthermore, the fact that the 1987 law responded to the decision in *Franks* does not render the law illegitimate. See Pet. Br. 45. Legislation is often prompted by judicial decisions, as shown by the 1984 amendments to the LHWCA discussed above. See pages 15-17, *supra*.[12]

---

[11] Furthermore, petitioners' proposed rules for due process review reverse the proper relationship between the constraints of the Due Process Clauses and those of the Contract Clause, Art. I, § 10, Cl. 1. Petitioners' rules impose much greater constraints on legislatures than are imposed under the Contract Clause analysis this Court has employed in modern decisions. See, *e.g.*, *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983). The Framers of the Constitution, however, "explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause," electing instead to impose "less searching standards" under the Due Process Clause. *Gray*, 467 U.S. at 732 n.9, 733.

[12] Many times Congress has amended laws, sometimes with retroactive effect, in response to interpretations of prior law by this

The constitutionality of such legislation under the Due Process Clauses depends in each case on whether the law furthers a legitimate legislative purpose in a rational manner, not on whether the legislature acted in response to a judicial decision.

B. The 1987 Michigan Law Furthers Legislative Intent In A Rational Manner

Petitioners contend that the 1987 law does not *rationally* further a legitimate purpose because they consider the beneficiaries of the 1987 law to be "double-dippers," Pet. Br. 24, 26, 49, and the "least deserving" of assistance, *id.* at 25, 49. As an initial matter, arguments of this sort are more properly directed to legislatures rather than to courts. See, *e.g.*, *Turner Elkhorn*, 428 U.S. at 19 ("whether a broader cost-spreading scheme would have been wiser or more practical * * * is

---

Court. See generally Slawson, 48 Calif. L. Rev. at 244-246 & n.148. For example, the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, 29 U.S.C. 251-262, amended the Fair Labor Standards Act of 1938 in response to this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In that case, the Court had held that the statutory workweek for which employees must be paid included time spent on activities such as walking to and from their work stations and putting on and removing work clothing. *Id.* at 690-694. Responding to the complaints of employers suddenly exposed to large, unanticipated overtime claims, 29 U.S.C. 251(a), Congress abolished both employer liability and the jurisdiction of the courts to decide such claims, and made those changes applicable retroactively to actions seeking overtime pay for work performed before the statute was amended. 29 U.S.C. 252(a) and (d). Those provisions of the Portal-to-Portal Act were upheld against retroactivity challenges by nine circuit courts. See *Moss* v. *Hawaiian Dredging Co.*, 187 F.2d 442, 445 & n.3 (9th Cir. 1951) (collecting cases). See also *Temple Univ.* v. *United States*, 769 F.2d 126, 128, 133-135 (3d Cir. 1985) (upholding a statute reversing this Court's decision in *Rowan Cos.* v. *United States*, 452 U.S. 247 (1981), and making a change in tax law retroactive for five years), cert. denied, 476 U.S. 1182 (1986)).

not a question of constitutional dimension"); *Ferguson* v. *Skrupa*, 372 U.S. at 732; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487-488 (1955) (a "law need not be in every respect logically consistent with its aims to be constitutional" under the Due Process Clause). Moreover, even though they insist that the 1987 legislation should have "target[ed] its benefits to the entire class of persons" who were injured before 1982, Pet. Br. 49, it is hard to believe that petitioners would be satisfied with a law that applied the 1982 increase in workers' compensation benefits retroactively to all such employees. At bottom, petitioners merely quibble with the means the Michigan legislature used to equalize the impact of the changes that took effect in 1982. The legislature could have chosen to apply both the coordination of benefits law and the law increasing benefits levels retroactively to cover injuries that occurred before 1982, as petitioners suggest. But it instead decided in 1987 that neither law should be applied retroactively, so that the pre-1982 scheme (lower benefit levels, but no coordination of benefits) applied to injuries incurred before 1982, while the 1982 changes applied in a prospective manner only.

Petitioners also contend that the 1987 law unfairly upset expectations on which they were entitled to rely when they insured against the risk of injuries to their employees. Pet. Br. 18-19, 44. But petitioners could not have relied on the 1981 law authorizing coordination of benefits when they decided to self-insure with respect to injuries incurred before 1982.[13] Nor could other employers have relied on the coordination of benefits law when

---

[13] Michigan law permits larger, financially sound employers like petitioners to self-insure under certain conditions. Mich. Comp. Laws Ann. § 418.611 (West 1985 & Supp. 1991); Citizens Ins. Amicus Br. 5. In 1988, Michigan employers and insurance carriers paid over one billion dollars in workers' compensation and associated medical benefits. Of that total, 54% was paid by private insurance carriers, 39% was paid by self-insurers, and 7% was paid by state funds. Nelson, *Workers' Compensation: Coverage, Benefits, and Costs, 1988*, Soc. Sec. Bull. 12, 18 (March 1991).

they purchased insurance against the risk of injuries to employees injured before 1982. That is so because those decisions were made before the coordination of benefits law was enacted and, as is the case under most workers' compensation statutes, under Michigan law the identity of the employer or carrier liable for all future compensation benefits is fixed at the time of the employment-related injury. Mich. Comp. Laws Ann. §§ 418.435, 418.621(2)(a) (West 1985 & Supp. 1991); 4 A. Larson, *Workmen's Compensation Law* § 92.23 (1990); *Pennsylvania Nat'l Mut. Casualty Ins. Co.* v. *Spence*, 591 F.2d 985 (4th Cir.) (LHWCA), cert. denied, 444 U.S. 963 (1979). Moreover, the premiums for those policies (and the assumptions made by self-insurers) were established at the beginning of the policy periods, when the coordination provision did not yet exist. Citizens Ins. Co., et al. Amicus Br. [hereafter Citizens Ins. Amicus Br.] 6; see also 4 A. Larson, *Workmen's Compensation Law*, *supra*, § 92.65. Accordingly, the employees acted on the assumption that disability payments under those policies could not be coordinated. See Citizens Ins. Amicus Br. 7.

The coordination of benefits law therefore gave insurance companies and self-insuring employers like petitioners a windfall. The insurance companies had collected premiums based on the assumption that payments to those employees could not be coordinated; self-insuring employers must also have planned to pay uncoordinated benefits. The 1987 law did no more than require them to disgorge that windfall, a result that fully comports with due process. Cf. *Graham & Foster*, 282 U.S. at 426.

After the coordination of benefits provision was enacted, self-insuring employers and insurance carriers may have made investment and spending decisions based on the assumption that they would not be required to disgorge their windfall. But any detrimental reliance by the employers and the insurers does not suffice to render the 1987 law arbitrary and irrational. First, as the state court correctly found, the law regarding coordination of

benefits was in a state of flux until the Michigan Supreme Court decided *Franks* in 1985. See Pet. App. 12a. Prior to *Franks*, both the state court of appeals and the state agency responsible for workers' compensation had held that employers could not coordinate the benefits of workers injured before 1982; the Michigan House and Senate had passed resolutions to the same effect. *Id.* at 3a n.2, 60a; see also Pet. Br. 22 n.9. Only 16 months elapsed between the denial of rehearing in *Franks* and the enactment of the 1987 law, and the legislative proposals that led to the law were introduced within months after denial of rehearing. In short, there was at most only a brief period during which employers and carriers could have relied on application of the coordination of benefits provision to injuries that occurred before 1982.

Second, any detrimental reliance by petitioners is countervailed by the competing interests of employees injured before 1982. Just as employers expected at the time of injury to pay those employees uncoordinated benefits, the employees expected at that time to receive uncoordinated benefits. The employees undoubtedly made decisions—such as how much of a mortgage to assume—based on their expectations that they would receive uncoordinated benefits. It was reasonable for the Michigan legislature to decide in 1987 to put them back in the situation that applied to them prior to 1982.

CONCLUSION

If the Court reaches the due process issue, the judgment of the Michigan Supreme Court should be affirmed with respect to that issue.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

DAVID S. FORTNEY
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

KERRY L. ADAMS
Counsel for Appellate Litigation

ELLEN L. BEARD
Attorney
Department of Labor

SEPTEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45058